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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO GONZALEZ CARRILLO, Defendant and Appellant.	G050784 (Super. Ct. No. 06NF3068) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed and modified.

Michael Ian Garey for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Alfonso Gonzalez Carrillo appeals from an order denying his motion to recall his sentence under the Three Strikes Reform Act of 2012 (the Act), which added Penal Code[1] section 1170.126 and amended sections 667 and 1170.12. Defendant's relevant prior conviction was for possession of firearm and ammunition by a felon. The trial court determined that during that offense, defendant was in actual possession of the firearm and ammunition. It also concluded defendant posed an unreasonable risk of danger to public safety. Accordingly, the court found him ineligible for resentencing and denied the motion.

Defendant contends on appeal that he was eligible for resentencing, the trial court improperly relitigated the nature of the offense and incorrectly found he posed a danger to public safety. He also argues the Act, as applied, violates equal protection principles.

Because we conclude the court's dangerousness finding was not an abuse of discretion, we need not consider the issue of whether he was eligible under the Act. We also conclude a five-year enhancement to defendant's original sentence was improperly imposed, and shall order the judgment modified accordingly.

I

FACTS

A. Defendant's Previous Criminal History

According to the probation report prepared in connection with the offense for which defendant sought relief under the Act,[2] his criminal history began as a juvenile at age 15. The offense was listed as section 241.1, assault on a custodial officer, and

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[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

[2] On our own motion and for good cause, we take judicial notice of the record in defendant's appeal in the underlying case. (Evid. Code, § 459.)

designated a felony. He was declared a ward of the court at the time and sentenced to 45 days at juvenile hall. In 1993, at age 16, the juvenile court found true an allegation under former section 594, vandalism between $400 and $5000. (Former § 594, subd. (b)(3).) This was apparently related to a gang fight. At the same time, the court also found true a misdemeanor allegation of disorderly misconduct. (§ 647, subd. (c).) Probation was continued. Although no detailed records were available, the probation report also reflects that three violations were filed while defendant was on juvenile probation. Wardship was continued each time, and for two of the violations defendant was ordered to serve time at juvenile hall.

As an adult, defendant's criminal record begins at age 18 in April 1995, when he committed a violation of section 487h, subdivision (a), a vehicle grand theft offense. He was given a suspended sentence of 3 years' probation after serving 180 days in jail. He was later found guilty of violating his probation, and probation for this offense was eventually terminated.

In July 1995, defendant was arrested for felony cocaine possession. (§ 11350, subd. (a).) He was on parole at the time, and received probation and a county jail sentence. In April 1996, he was arrested for possessing property from which a manufacturer's serial number had been removed, a misdemeanor. (§ 537e, subd. (a).) That case resulted from officers finding six car stereos under his bed. He was again sentenced to probation and jail.

In September 1996, defendant, then age 19, was arrested and eventually convicted of violating sections 459/460, subdivision (a), 496, subdivision (a), and 186.22, subdivision (a). The charges arose out of the second degree burglary of a car stereo and receiving stolen property, crimes that were determined to be for the benefit of the Varrio Viejo criminal street gang. He was sentenced to three years in prison.

In April 1999, defendant was age 22. He was arrested for a misdemeanor violation of section 148, subdivision (a), willfully resisting or delaying police officer. (§ 148, subd. (a).)

At age 24, in September 2001, defendant, who was on parole, was in the front passenger seat of his own vehicle when the driver was stopped for a Vehicle Code violation. When searched, defendant was found to have a .357 caliber bullet in his pocket. As the officer began to handcuff him, he fled the area, and was taken into custody several hours later. The driver had bullets of the same caliber in her purse, and several days later, a .357 caliber gun was located nearby. Patrol vehicle video revealed the driver of the car throwing the gun out of the car just after defendant fled.

Defendant was charged with a misdemeanor violation of section 148, subdivision (a), willfully resisting or delaying police officer, and two felony counts: 1) felon in possession of ammunition (§ 12316, subd. (b)(1)), and 2) felon in possession of a firearm (former § 12021, subd. (a)(1)). Ultimately, defendant was convicted on all counts and sentenced to 32 months in prison. He was paroled in January 2005, then subsequently returned to prison for testing positive for methamphetamine. In sum, he was either on parole, probation or in custody since he was 15 years old.

B. The 2006 Offense

In May 2006, defendant worked as a gardener in an apartment complex. On August 27, residents of the complex called the police because a strange white truck was driving in and out of the parking lot. The police found defendant in the parking lot, and he claimed he was the gardener and there to turn on the sprinklers. The officers learned the truck was a rental, and the rental agreement was in defendant's name. They also found a bag on the driver's side floor that contained a loaded pistol and 200 rounds of ammunition of the same caliber. Defendant denied the truck belonged to him, and

could not explain why the rental agreement was in his name. He admitted he might have ridden in the truck earlier that week.

In 2008, defendant was found guilty of one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)) and one count of possession of ammunition by a felon (§ 12316, subd. (b)(1)) (collectively the firearm counts). The court found true allegations that defendant had been convicted of three prior strikes within the meaning of sections 667, subdivisions (d), (e)(2)(A) and 1170.12, subdivision (c)(2)(A)(iv), convicted of a serious felony within the meaning of section 667, subdivision (a)(1), and had served two prior prison terms within the meaning of section 667.5.[3] The court sentenced defendant to 25 years to life on the possession of a firearm count, plus a five year enhancement for the prior conviction of a serious felony pursuant to section 667, subdivision (a)(1).

Since he began his prison sentence in 2006, he was involved in a number of "incidents" as classified by the Department of Corrections and Rehabilitation. Ten of these were classified as minor and six as major, the most serious being possession of contraband and involvement in mutual combat, in June and November 2008, respectively. Prison records reflect gang associations, and he was housed in a maximum security facility.

On July 29, 2013, defendant petitioned the trial court to modify his sentence pursuant to the Act. The petition stated he was eligible for resentencing under the Act. The prosecution opposed, arguing defendant was ineligible because he was armed with a firearm during the offense, and even if he was eligible, resentencing should be denied because defendant's release would pose an unreasonable risk of danger to public safety. The trial court found both the prosecution's arguments to be well-founded and denied defendant's petition. Defendant now appeals.

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[3] Defendant argues, and it appears from the record, that his prior strikes and convictions arose from two incidents: the matter that involved second degree burglary, receiving stolen property, and gang offenses in 1996; and possession of a firearm in 2001.

II

DISCUSSION

A. Statutory Framework and Standard of Review

"On November 6, 2012, voters approved Proposition 36, the Three Strikes Reform Act of 2012 (the Act). Under the three strikes law [citation] as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies would be subject to a sentence of 25 years to life upon conviction of a third felony. Under the Act, however, a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the third felony is *itself* a serious or violent felony. If the third felony is not a serious or violent felony, the defendant will receive a sentence as though the defendant had only one prior serious or violent felony conviction, and is therefore a second strike, rather than a third strike, offender. The Act also provides a means whereby prisoners currently serving sentences of 25 years to life for a third felony conviction which was not a serious or violent felony may seek court review of their indeterminate sentences and, under certain circumstances, obtain resentencing as if they had only one prior serious or violent felony conviction. According to the specific language of the Act, however, a current inmate is not entitled to resentencing if it would pose an unreasonable risk of danger to public safety." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285-1286, fn. omitted.)

At the resentencing hearing, the prosecution must establish by a preponderance of the evidence that the defendant poses an unreasonable risk of danger to public safety. (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305.)[4]

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[4] While this case was pending, a different panel of this court decided *People v. Valdez* (2016) 246 Cal.App.4th 1410 (*Valdez*), which concluded the definition of "unreasonable risk of danger to public safety" was narrowed by the Safe Neighborhoods and Schools Act, popularly known as Proposition 47. (This issue is already before the California Supreme Court in a pending case – see *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676.) The defendant in *Valdez* apparently passed away after the case was filed. At this court's request, the California Supreme Court

The court's ultimate conclusion as to whether the defendant poses an unreasonable risk of danger is a discretionary one. (§ 1170.126, subd. (f).) In the context of sentencing decisions, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court's factual findings are subject to review for substantial evidence. Thus, "[w]e review the whole record in a light most favorable to the [order] to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value" upon which the court could base its conclusions. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859.)

B. Unreasonable Risk of Danger to Public Safety

In making its determination as to whether a defendant poses an unreasonable risk of danger, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Defendant argues that unlike many who seek resentencing under Proposition 36, his record "hardly bespeaks an extreme danger to society." He has never been convicted of a violent felony, and his strike offenses both apparently seem to have been committed during the same case, the 1996 car burglary which was committed for

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transferred the case back to this court with directions to vacate the decision and reconsider the case, including the issue of abatement. (*People v. Valdez* (July 13, 2016, S235048) __Cal.4th __ [2016 Cal. LEXIS 4891].) The case has since been abated. Accordingly, the *Valdez* opinion is no longer a citable published case, and we need not consider it.

the benefit of a street gang. His other offenses were not serious or alleged as strikes. "As 'third strikers' go, his record is not indicative of someone who is such a danger that a 'three strikes' sentence is necessary for the protection of society."

The trial court reached the following, different conclusion about defendant when he was initially sentenced for his most recent offenses: "'The defendant appears to be a hard-core gang member whose allegiance to his gang prevents him from conforming his behavior to what is expected of a free, law-abiding society. [¶] 'The defendant is 33 years old, has been the subject of law enforcement intervention since the age of 15. His offenses include gang fights, car burglaries, drug offenses, possession of stolen car stereos, resisting arrest, and possession of a firearm by a felon in 2002, as well as the present offense. [¶] 'Since being incarcerated, he has committed 16 jail rule violations of which six were determined to be major. He has been placed on parole and probation and violated the terms and conditions of both. He suffered a previous conviction for possession of a firearm and was given a break by the court, which struck two of his strikes and sentenced him as a one-strike offender. [¶] 'In this case, defendant was in possession of not only a firearm, but 200 rounds of ammunition. In the court's opinion, either he was intending to engage in some very heavy duty gunfire or he was acting as the holder of a Varrio Viejo gang gun. In either case, [defendant] is a continuing danger. He denies responsibility for his actions, and he blames everyone but himself for his misdeeds. [¶] 'His conduct and mind set place him squarely within the spirit of the Three Strikes Law.'"

The court did not change its mind upon considering the instant petition. The court specifically discussed the altercation (referred to in the record as a "gang riot") defendant had been involved in while imprisoned. While defendant continues to minimize this incident by pointing out he did not inflict any injury and was never criminally charged, the court considered this as evidence of dangerous behavior engaged in by defendant after he was sentenced in the prior case. The court also pointed out:

"[B]eing a gang member itself creates a reasonable danger when someone has only been in prison for less than six years and his whole history is related to being unable to be a safe, law-abiding, nongang member of society, but one of his first convictions as a juvenile was for assault."

The court noted that if defendant "lacks an understanding about the consequences of his actions, he shouldn't be released. If he doesn't care about the consequences of his actions, he should not be released. There is no reason that this court can think of why someone would have that much ammunition, a loaded firearm when that person knows he is a felon, has previously had a strike conviction and [was] still engaged in criminal behavior. He's continued to engage in antisocial behavior in prison, and in this court's opinion, he should not be given an early release and the motion is denied." The court also stated that a felon riding around with a firearm and significant amounts of ammunition constituted a danger to society.

The trial court's factual findings were supported by substantial evidence, and its conclusion that defendant posed an unreasonable risk of danger to public safety was not an abuse of discretion. The court reviewed defendant's extensive history, which painted a picture of an individual who had been under the supervision of the justice system continuously since age 15. While defendant is correct that he has not committed particularly violent offenses, his entire history indicates a person who either cannot or will not behave as society reasonably expects. He has been given parole and probation on numerous occasions, and committed other offenses even while subject to such supervision. His 2006 offense was actually the same offense which he committed previously: felon in possession of a firearm. Instead of sentencing him as a third striker for that earlier offense, he was given a further opportunity to redeem himself and a relatively short sentence. He did not take advantage of that opportunity, he was released from prison and soon thereafter committed the same offense again, this time with 200 rounds of ammunition also in his possession.

Taken as a whole, we find no abuse of discretion in the court's conclusion that defendant posed an unreasonable risk of danger to society.

C. "Relitigating" the Underlying Facts

Defendant also contends the trial court relitigated the underlying facts when ruling on his petition, implicating his rights to due process, confrontation, and a jury trial. He also argues the Act includes a pleading and proof requirement.

Defendant is wrong. The Act itself states that it is within the province of the court, not a jury, to determine whether a petitioner meets the criteria for resentencing. (§ 1170.126, subd. (f).) We disagree with any contention that the trial court "relitigated" the facts. Instead, as it was supposed to do, the court reviewed the facts. No error is demonstrated by the record.

Moreover, it is abundantly clear that the Act contains no pleading and proof requirement. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332; see *People v. Guilford* (2014) 228 Cal.App.4th 651, 657-658; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059-1060.) Defendant also has no right to a jury trial. (See, e.g., *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1315.) Without such a right, defendant's confrontation and due process arguments must fail.

D. Equal Protection

Defendant further argues the Act violates equal protection principles because it "does not require a showing of non-dangerousness by currently convicted felons, and secondly, as interpreted, only previously convicted felons can be disqualified because of an offense that was never pled nor proven." As defendant acknowledges, this issue was considered and rejected in *People v. Losa* (2014) 232 Cal.App.4th 789.

Defendant offers no compelling reason why the *Losa* court was wrong, and we follow its holding.

E. Additional Term Under Section 667, Subdivision (a)(1)

During our review of the record in this case, it appeared the trial court not only imposed a term of 25 to life on defendant's conviction for felon in possession of a firearm, but it also imposed an enhancement under section 667, subdivision (a)(1). We requested briefing from the parties as to whether this enhancement was correctly imposed; both agree that it was not.

Section 667, subdivision (a)(1), provides a five-year sentence enhancement for serious felony priors. "The statute applies only if the current conviction itself is also a serious felony. Serious felonies are defined in section 1192.7, subdivision (c)." (*People v. Taylor* (2004) 118 Cal.App.4th 11, 22.) Section 1192.7, subdivision (c), lists certain felonies automatically categorized as serious; felon in possession of a firearm or ammunition are not among them. Section 1192.7, subdivision (c), also defines other crimes as serious based on the defendant's conduct, if the prosecution pleads and proves the necessary facts, but the record does not reflect such facts were properly found here.

We have the authority to vacate an unauthorized sentence enhancement at any time. (*People v. McGee* (1993) 15 Cal.App.4th 107, 117.) We therefore order the enhancement stricken, and the abstract of judgment modified to reflect a total prison term of 25 to life.

III

DISPOSITION

The judgment is affirmed. The clerk of the trial court is directed to modify defendant's original sentence to strike the additional term of five years imposed under section 667, subdivision (a)(1). The clerk is also directed to prepare an amended abstract

of judgment reflecting this modification and forward a certified copy to the Department of Corrections and Rehabilitation.

MOORE, J.

I CONCUR:

O'LEARY, P. J.

ARONSON, J., Concurring.

I concur in the result, but write separately to address Alfonso Carrillo's contention the more specific definition of "an unreasonable risk of danger to public safety" contained in Proposition 47 applies to Proposition 36 resentencing petitions.

In Proposition 47, the "Safe Neighborhoods and Schools Act," the voters defined the phrase "unreasonable risk of danger to public safety," as it is "*used throughout this code*," to mean an unreasonable risk of committing certain enumerated felonies designated as the most violent and serious offenses. This is a straightforward command. Proposition 47's definition therefore applies wherever the phrase "unreasonable risk of danger to public safety" appears in the Penal Code. The identical phrase is found in Proposition 36. Indeed, it is beyond coincidence that the only other Penal Code section to contain the phrase "unreasonable risk of danger to public safety" is found in Proposition 36. I explained the reasons supporting this conclusion in my concurrence in *People v. Guzman* (2015) 235 Cal.App.4th 847, 861, review granted June 17, 2015, S226410, and therefore do not repeat them here.

Nevertheless, I concur in the result because the trial court rejected Carrillo's Proposition 36 resentencing petition before the voters passed Proposition 47. Nothing indicates the voters intended Proposition 47 to have retroactive application. I discussed the retroactivity argument in more detail in my *Guzman* concurrence and therefore do not repeat that discussion here.

Thus, I conclude the trial court did not err in using the broader discretionary standard in Proposition 36 that applied before the passage of Proposition 47.

ARONSON, J.